



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Sheila Sprague
Office of Intergovernmental Relations

FROM: Marc P. Hansen *Marc Hansen*
Deputy County Attorney

DATE: January 13, 2009

RE: Roadside Solicitation—MC 920-09; MC 927-09

I had previously expressed to you certain legal concerns that I had concerning two proposed Bills under consideration by the County's Delegation to the General Assembly. You have asked me to explain my concerns in writing.

Both Bills, MC 920-09 and MC 927-09, address solicitation of money in a "roadway, median divider, or intersection" (collectively, roadway). Although the two Bills raise similar legal concerns, the two Bills differ in some important respects.

MC 920-09. MC 920-09 empowers "the Montgomery County Council"¹ to enact a law to require "adults or adult representatives of qualified organizations" to obtain a permit before soliciting money from the occupant of a vehicle while the adult soliciting the money is in the roadway. If the County enacts a law under Bill MC 920-09, a person may not solicit money in a roadway without first obtaining a permit. If the County does not enact a law under MC 920-09, pedestrians may presumably continue to solicit money from occupants of vehicles so long as the person soliciting the funds complies with the rules of the road applicable to pedestrians.² Like

¹ The term "governing body" should be used instead of the term "Montgomery County Council". Under the County Charter, the governing body of Montgomery County (the Council and Executive exercising their respective powers under the Charter) enacts local legislation. See Charter §§ 111 and 208.

² These rules can be found in § 21-501, *et. seq.* of the Md. Transportation Code. Generally, a pedestrian may walk in a road (if there is no sidewalk) against traffic and cross a road. A pedestrian may need to yield to oncoming traffic depending if the pedestrian crosses at a crosswalk or not.

MC 927-09, MC 920-09 limits the universe of organizations for which money may be solicited to a “fire company or bona fide religious, fraternal, civic, war veterans’, or charitable organizations.”

MC 927-09. MC 927-09 prohibits a person from soliciting money in a roadway unless the County Council³ enacts a local law to allow “adults and adult representative of qualified organizations” to solicit money. The local law must require the adult who wishes to solicit money while in a roadway to obtain a permit; the applicant for a permit must submit a safety plan (MC 920-09 is silent on this issue); and the permit may be good for no more than 3 days in a calendar year—it is unclear if the applicant can request more than one permit in a calendar year.

Both Bills appear to permit an adult to solicit money in a roadway to either personally benefit the adult solicitor or to benefit the same limited universe of organizations. Thus, an adult can solicit money carrying a sign saying “Homeless. Please Help”. Or an adult can solicit money carrying a sign saying “Support Your Volunteer Firefighters! Please Contribute to Kensington Volunteer Fire Corporation.” But an adult may not solicit money carrying a sign saying “Support Pro-Choice. Please Contribute.”; or a sign saying “Please Contribute to American University.”; or a sign saying “Support Charter Question A. Please Contribute.”

There can be little debate that the purpose of these two Bills is to promote traffic and pedestrian safety. So under what rationale do the two Bills treat a person who solicits for a charity differently from a person who solicits for a political cause or an educational institution? This disparate treatment is the basis for my legal concern.

Soliciting money—especially on behalf of a non-commercial organization—is a form of speech and is protected activity under the First Amendment. *Village of Schaumburg v. Citizens For A Better Government*, 444 US 620 (1980); *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 US 150 (2002). The ability of the government to regulate speech—especially on a traditional public forum like a street—is “sharply circumscribed” and is subject to the “highest scrutiny.” *International Society for Kirshna Consciousness, Inc. v. Lee*, 505 US 672, 678 (1992); *Hague v. CIO*, 307 US 496 (1939). To be sure, some public areas—such as traveled portions of roads—may not be as open to speech activity as a park or sidewalk. But once the government permits speech activity on a non-traditional public forum (such as the traveled portion of the roadway), it must do so without discrimination on the basis of the viewpoint or content of the speech. *Heffron v. ISKCON*, 452 US 640 (1981). By permitting some organizations to solicit money in a roadway and prohibiting other organizations from soliciting money, both Bills engage in viewpoint or content based discrimination and are, in my opinion, impermissible under the First Amendment.

Under Article 23 of the Maryland Declaration of Rights, legislation must bear some substantial relation to the purpose for which the statute is enacted. “...[I]f a statute purporting to have been enacted to protect the public morals or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is ...[the court’s] duty to so adjudge and thereby give effect to the Constitution.” *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 106-107 (1973). These two Bills appear to fail this substantive due process test, as well as violate the free speech guarantee of the First

³ See footnote # 1, above.

Amendment. I can discern no rational connection between the purpose of the Bills (promoting traffic and pedestrian safety) and the provisions of the bill permitting some organizations to solicit money in the road and prohibiting other organizations from engaging in the same activity.

Please let me know if you have questions regarding this advice.

Cc: Leon Rodriguez, County Attorney
Kathleen Boucher, Assistant Chief Administrative Officer
Michael Faden, Senior Legislative Attorney

MPH: